

**FEDERAL TRADE COMMISSION  
16 CFR Part 435**

**Mail or Telephone Order Merchandise**

**AGENCY:** Federal Trade Commission.

**ACTION:** Request for public comments.

**SUMMARY:** The Federal Trade Commission (“FTC” or “Commission”) requests public comment on the overall costs, benefits, and regulatory and economic impact of its Mail or Telephone Order Merchandise Rule (“MTOR” or “Rule”), as part of the Commission’s systematic review of all current Commission regulations and guides. The Commission has made no determination respecting retention of the Rule. Assuming, for the sake of seeking comment, the record supports retaining the Rule, the Commission also requests public comment on possible changes to the Rule to bring it into conformity with changed market conditions, including: (1) consumers using means other than the telephone to access the Internet; (2) consumers paying for merchandise by means other than cash, check, money order, or credit card; and (3) merchants using methods other than cash, check, money order, or credit card charge reversals to make prompt Rule-required refunds. Finally, in the event the Commission decides to retain the Rule, the Commission requests comment on reorganizing the Rule by alphabetizing the definitions in Section 435.2 and reordering and renumbering Sections 435.1 and 435.2 to track the pattern followed by the Commission in its other rules. In addition to inviting the public to comment on whether it should retain the Rule, the Commission further invites the public to suggest any changes that would bring the Rule into conformity with changed conditions or that would make the Rule clearer.

**DATES:** Comments will be accepted until November 7, 2007.

**ADDRESSES:** Interested parties are invited to submit written comments. Comments should refer to “16 CFR Part 435 Comment - Mail or Telephone Order Merchandise Rule, Project No. P924214” to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission/Office of the Secretary, Room H-135 (Annex K), 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Comments containing confidential material, however, must be clearly labeled “Confidential,” and must comply with Commission Rule 4.2(d), 16 CFR 4.2(d).<sup>1</sup> The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions.

Comments filed in electronic form should be submitted by following the instructions on the web-based form at <https://secure.commentworks.com/ftc-MTORComment>. To ensure that the Commission considers an electronic comment, you must file it on that web-based form. You may also visit <http://www.regulations.gov> to read this notice, and may file an electronic comment through that website. The Commission will consider all comments that [www.regulations.gov](http://www.regulations.gov) forwards to it.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives, whether filed in paper or electronic

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<sup>1</sup> The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission’s General Counsel, consistent with applicable law and the public interest. See Commission Rule 4.9(c), 16 CFR 4.9(c).

form. Comments received will be available to the public on the FTC website, to the extent practicable, at <http://www.ftc.gov>. As a matter of discretion, the FTC makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC website. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at <http://www.ftc.gov/ftc/privacy.htm>.

**FOR FURTHER INFORMATION CONTACT:** Joel N. Brewer, Attorney, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, DC, 20580; (202) 326-2967.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The FTC promulgated the Mail Order Rule (as the Rule was then called) in 1975 in response to consumer complaints that many merchants had failed to ship merchandise ordered by mail on time, failed to ship at all, or failed to provide prompt refunds for unshipped merchandise.<sup>2</sup> A second proceeding in 1993 demonstrated that consumers who ordered merchandise by telephone experienced the same delayed shipment and refund problems. Accordingly, under authority of Section 18 of the FTC Act, 15 U.S.C. 57a, the Commission amended the Rule, effective March 1, 1994, to cover merchandise ordered by telephone,

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<sup>2</sup> 40 FR 51582 (Oct. 22, 1975). The FTC initiated the rulemaking in 1971 under Section 6(g) of the FTC Act, 15 U.S.C. 46(g), and substantially completed the rulemaking when Congress amended the FTC Act by adopting Section 18, 15 U.S.C. 57a. By operation of law, the Commission treated the Mail Order Rule as having been promulgated under authority of Section 18. The Mail Order Rule took effect February 2, 1976.

including by telefax or by computer through the use of a modem (*e.g.*, Internet sales), and renamed it the “Mail or Telephone Order Merchandise Rule.”<sup>3</sup>

Generally, the MTOR requires a merchant to: (1) have a reasonable basis for any express or implied shipment representation made in soliciting a sale; (2) ship within the time period promised and, if no time period is promised, within 30 days; (3) notify the consumer of, and obtain the consumer's consent to, any delay in shipment; and (4) make prompt and full refunds when the consumer exercises a cancellation option or the merchant is unable to meet the Rule’s shipment or notification requirements.

## **II. Changing Conditions**

With changes in technology and commercial practices, some of the Rule’s provisions may no longer fully achieve the Commission’s original goals. This section discusses these market changes and possible changes in the Rule’s language to address them. The Commission has not concluded whether the changes discussed in this part are substantive or non-substantive, and it seeks comment on this subject.<sup>4</sup> The first such change concerns the uses of technologies other than the telephone to access the Internet. The second and third changes relate to the growing availability of alternative payment and refund methods.

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<sup>3</sup> 58 FR 49095 (Sept. 21, 1993).

<sup>4</sup> Section 18 (a)(2) of the FTC Act, 15 U.S.C. 57a(a)(2), provides that in making substantive changes to rules that define with specificity unfair or deceptive acts or practices, the Commission must follow the procedures set forth in section 18(b)(1), 15 U.S.C. 57a(b)(1). Section 18(a)(2) also provides that, in making non-substantive rules (including interpretive rules) and general statements of policy, the Commission need not follow these procedures. Thus, the Commission could make non-substantive changes in accordance with sections 1.21 *et seq.* of the Commission’s Rules of Practice, 16 CFR 1.21 *et seq.*, relating to rules promulgated under authority other than section 18(a)(1)(B) of the FTC Act.

A. Consumer Access To The Internet By Means Other Than The Telephone

The Rule covers purchases of most merchandise ordered by telephone.<sup>5</sup> Section 435.2(b) of the Rule defines “telephone” as “any direct or indirect use of the telephone to order merchandise, regardless of whether the telephone is activated by, or the language used is that of human beings, machines, or both.” In promulgating this definition, the Commission made clear that it intended to cover all orders made by computer, including Internet orders.<sup>6</sup> The Commission’s definition of “telephone” accomplished this goal because at the time, consumers necessarily accessed the Internet through the telephone.<sup>7</sup> As the Internet became an increasingly popular means of ordering merchandise, however, alternative means of access (*e.g.*, cable and wireless) replaced some telephone dial-up services, blurring the Rule’s coverage.

Because the Commission intended that the Rule cover all Internet ordering, regardless of the consumer’s means of access, the Commission seeks comment on whether it should propose amending the Rule expressly to cover merchandise ordered by computer and/or via the Internet.<sup>8</sup>

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<sup>5</sup> See Section 435.1(a)(1). The only exceptions, listed in Part 435.3, include: (1) subscriptions (other than the initial installment); (2) seeds and growing plants; (3) C.O.D. orders; and (4) negative option sales covered by 16 CFR Part 425. None of the proposed changes would alter these exceptions.

<sup>6</sup> The Commission noted that rulemaking participants understood that the definition of “telephone” was meant to “cover orders taken by mechanical means over the phone, orders placed by computers, and orders placed by fax transmission.” 58 FR 49095, 49113.

<sup>7</sup> Since then, it appears that many industry members and trade associations have treated the Rule as applicable to all orders by computer. For example, the Direct Marketing Association (DMA), a national trade association for the direct marketing industry, advises members that the Rule applies to merchandise ordered by computer. See, [www.the-dma.org/guidlines/30dayrule](http://www.the-dma.org/guidlines/30dayrule).

<sup>8</sup> If the Commission amends the Rule to address this issue, it could also change the name of the Rule by adding the words “computer” and/or “Internet” to the title, or by replacing it with a title used by some industry members, the “Distance Shopping Rule.”

B. Consumer Payment By Demand Draft, Debit Card, Or Other Means

Consumers' payments for goods trigger all of the merchants' obligations under the Rule. For example, the merchant's obligation to ship within the promised time (or within 30 days, if no time is promised) begins with its receipt of the consumer's "properly completed order," comprised of "all information needed to process the order" and "full or partial payment in the proper amount."<sup>9</sup> Moreover, different obligations ensue depending upon whether consumers pay by credit card or other means.<sup>10</sup>

It is, therefore, important that the Rule clearly delineate which payments trigger the merchant's obligations. Unfortunately, the advent of new payment methods has created some ambiguity on this issue. This ambiguity arises from the Rule's definitions. On the one hand, in promulgating Section 435.2(a) of the Rule, the Commission attempted to make clear that the Rule applied to all payment methods. Specifically, Section 435.2(a) defines "mail or telephone order sales" as "sales in which the buyer has ordered merchandise from the seller by mail or telephone, regardless of the method of payment . . ." (emphasis added). On the other hand, the definitions of "receipt of a properly completed order," "refund," and "prompt refund," only include payment by "cash, check, money order," or "authorization from the buyer to charge an existing charge account." At the time the Commission adopted Section 435.2(a) no potential conflict existed because consumers paid for virtually all mail and telephone order purchases by the means enumerated in Sections 435.2(d)-(f). Consumers' current use of non-enumerated payments systems such as debit cards or demand drafts, however, requires the Commission to revisit the issue.

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<sup>9</sup> Section 435.2(d).

<sup>10</sup> Section 435.1(c) requires the merchant to make a "prompt refund" under certain circumstances. Section 435.2(f) defines a "prompt refund" depending on whether the buyer paid for the merchandise by charging it or paying with cash, check, or money order.

To effectuate its clear intent as expressed in Section 435.2(a), the Commission now seeks comment on whether to propose amending Sections 435.2(d) and (e)<sup>11</sup> to eliminate the phrase “cash, check, money order” wherever it appears and substitute the words “other than credit.”<sup>12</sup> This change, however, would not end the inquiry. The MTOR creates different responsibilities depending on whether a consumer pays by a traditional means (*i.e.*, cash, check, or money order) or by credit. For example, Section 435.2(f)(1) provides that the merchant must make refunds in the form of cash, check, or money order within seven working days of the buyer’s right to a refund vesting, while Section 435.2(f)(2) provides that the merchant must make credit refunds within one billing cycle of the buyer’s right to a refund vesting. Payment by a new method, such as debit card or a demand draft, does not explicitly fall into either category. If the Commission proposes to change the Rule, it must determine into which of the two categories the new payment methods best fall, or whether they should be placed in a third category.

The Commission could treat these new payment methods in the same manner as cash, checks, and money orders. The different time period for providing refunds to consumers who have paid with credit is based on the unique features of the credit card payment system. Specifically, merchants using the credit card payment system use this system to reverse charges as well. Their actions can only be realized by consumers after at least one billing cycle. In contrast, debit cards and demand drafts allow merchants to access consumers’ bank accounts in the same manner as traditional checks. It, therefore, seems appropriate to treat demand drafts and debit cards in the same manner as check payment methods.

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<sup>11</sup> Section 435.2(f) incorporates by reference the payment methods enumerated in Sections 435.2(d) and (e). Therefore, by amending Sections 435.2(d) and (e), the Commission will effectively amend Section 435.2(f) as well.

<sup>12</sup> Thus Section 435.2(e)(1) could read: “‘Refund’ shall mean: (1) Where the buyer tendered full payment for the unshipped merchandise in any form other than credit, a return of the amount tendered in the form it was tendered.”

### C. Making Refunds Using Means Other Than First Class Mail

When it adopted the refund provisions of the Rule in 1975, the Commission expressed concern that consumers receive their Rule-required refunds “as soon as possible while not putting an unobtainable or unreasonable time constraint on sellers.”<sup>13</sup> Thus Section 435.2(f)(1) requires that merchants subject to the Rule provide refunds (other than credit card refunds) by first class mail within seven business days of the consumer’s right to a refund vesting. More recently, new, practicable means of sending refunds at least as quickly and reliably as first class mail may have been developed (*e.g.*, electronic funds transfer). However, merchants may feel constrained by the language of the Rule to use only first class mail for making refunds. Similarly, for purchases paid by credit card, Section 435.2(f)(2) provides that merchants making refunds must send a credit memorandum to the consumer or other notice by first class mail within one billing cycle. Appropriate e-mail notification of a charge reversal, however, may be just as fast and reliable as providing notice by first class mail.

It may be appropriate, therefore, for the Rule to allow merchants increased flexibility in choosing the means by which they transmit cash refunds or notify consumers of charge reversals. The FTC could accomplish this change by replacing the words “first class mail” with the words “by any means at least as fast and reliable as first class mail” in Sections 435.2(f)(1) and (2). This would make it clear to merchants that they could use other means, such as private courier or electronic transfer, to provide refunds as long as the means are at least as fast and reliable as first class mail. The Commission has no basis for believing that such changes would affect current industry compliance practice.

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<sup>13</sup> 40 FR 51582, 51593.

### **III. Possible Renumbering**

To comport with recent rules and to make the Rule easier to navigate, the Commission may prefer to organize the Rule by placing its definitions first, followed by the Rule's substance. Additionally, the Commission may prefer to organize its definitions alphabetically. If the Commission decides to retain the Rule, it may propose, therefore, to reverse and renumber Sections 435.1 and 435.2, and array each of the terms defined in alphabetical order.

### **IV. Regulatory Review Program**

The Commission has determined to review all current Commission rules and guides periodically. These reviews seek information about the costs and benefits of the Commission's rules and guides and their regulatory and economic impact. The information obtained assists the Commission in identifying rules and guides that warrant modification or rescission. Therefore, the Commission solicits comment on, among other things, the economic impact of the Mail or Telephone Order Merchandise Rule; possible conflict between the Rule and state, local, or federal laws; and the effect on the Rule of any technological, economic, or other industry changes.

### **V. Request For Comment**

The Commission solicits written public comment on the following questions:

- (1) Is there a continuing need for the Rule as currently promulgated?
- (2) What costs has the Rule imposed on, and what benefits has the Rule provided to, purchasers of merchandise ordered by mail or telephone?
- (3) In what respects has the Rule affected the operation of third-party dispute mediation agencies such as the Better Business Bureau (hereafter, "mediation agencies"), or state law enforcement agencies?

(4) What costs or benefits would amending the Rule explicitly to cover all computer and Internet orders impose on or provide to consumers, merchants, mediation agencies, or state law enforcement agencies? If the Commission decides to propose such a change, how should it revise the text of the Rule?

(5) What costs or benefits would amending the Rule to refer to payment by means other than cash, check, money order, or credit card impose on or provide to merchants, consumers, mediation agencies, or state law enforcement agencies? If the Commission decides to propose such a change, how should it revise the text of the Rule? Should the text provide an expanded list of payment methods, general classifications of payment methods (such as credit card vs. all other methods), or some other alternative?

(6) What costs or benefits would amending the Rule to permit Rule-required refunds or notices of charge reversals by means at least as fast and reliable as first class mail impose on or provide to merchants, consumers, mediation agencies, or state law enforcement agencies?

(7) What changes, if any, should the FTC make to the Rule to increase the benefits of the Rule to purchasers? How would these changes affect the costs the Rule imposes on firms subject to its requirements? How would these changes affect the benefits to purchasers?

(8) What burdens or costs, including costs of compliance, has the Rule imposed on firms subject to its requirements? Has the Rule provided benefits to such firms? If so, what benefits?

(9) What changes, if any, should the FTC make to the Rule to reduce the burdens or costs imposed on firms subject to its requirements? How would these changes affect the benefits provided by the Rule?

(10) How could any of the changes suggested in Part II of this notice be modified to reduce the burdens or costs imposed on firms subject to its requirements? How would these

modifications affect the benefits provided to merchants, consumers, mediation agencies, or state law enforcement agencies?

(11) Does the Rule overlap or conflict with other federal, state, or local laws or regulations?

(12) Would any of the changes to the Rule suggested in Part II of this notice overlap or conflict with other federal, state, or local laws or regulations?

(13) Since the FTC issued the Rule in its current form, what effects, if any, have changes in relevant technology, commercial practices or economic conditions had on the Rule? To what extent would the changes to the Rule suggested in Part II of this notice accommodate these changes?

(14) To what extent are the changes discussed in Part II of this notice either substantive or non-substantive?

(15) Should the Commission make any of the changes suggested in Part III of this notice?

## **VI. Communications by Outside Parties to Commissioners or Their Advisors**

Written communications and summaries or transcripts of oral communications respecting the merits of this proceeding from any outside party to any Commissioner or Commissioner's advisor will be placed on the public record. See 16 CFR 1.26(b)(5).

### **List of Subjects in 16 CFR Part 435**

Mail order merchandise, Telephone order merchandise, Trade practices.

**Authority:** 15 U.S.C. 41-58.

By direction of the Commission.

Donald S. Clark  
Secretary